

Reconsideration of Prior Statement of Decision
04-RL-3759-02, 4-RL-3760-03, and 04-RL 3916-04
Supporting Documentation

1. Statutes 1980, chapter 1143
2. *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875
3. *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986
4. *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96
5. *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340

SEC. 3. This act shall become operative July 1, 1981.

CHAPTER 1143

An act to amend Section 65302 of, and to add Article 10.6 (commencing with Section 65580) to Chapter 3 of Division 1 of Title 7 of the Government Code relating to local planning.

[Approved by Governor September 26, 1980 Filed with
Secretary of State September 26, 1980.]

The people of the State of California do enact as follows:

SECTION 1. The Department of Housing and Community Development shall within 30 days after the effective date of this section prepare and send to each county and city a questionnaire requesting the following information:

(1) The number of mobilehome parks within the jurisdiction, and the authorized number of mobilehome sites in each park.

(2) The number of requests or permit applications for change of use of the mobilehome park.

(3) The number of applications for the establishment of new mobilehome parks.

(4) The disposition of requests or permit applications for change of use of mobilehome parks or applications for the establishment of new mobilehome parks and the reasons for denial of such requests or applications.

(5) The availability of land within the jurisdiction that may be appropriate for establishment of mobilehome parks.

(6) Local established practices, policies, and ordinances concerning change of use of mobilehome parks.

(7) Local efforts and policies for reducing the incidence of change of use of mobilehome parks within the jurisdiction.

The information specified in paragraphs (1) to (4), inclusive, shall cover the period from January 1, 1979, through December 31, 1979. The information specified in paragraphs (5) to (7), inclusive, shall reflect current conditions and circumstances as of the time of the completion of the questionnaire.

The department shall prepare and submit a written report to the Legislature on or before July 1, 1981, containing an evaluation of the information received in response to the questionnaire.

This section shall apply to charter cities and counties as well as general law cities and counties.

SEC. 2. Section 65302 of the Government Code is amended to read:

65302. The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan

proposals. The plan shall include the following elements:

(a) A land use element which designates the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land. The land use element shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan. The land use element shall also identify areas covered by the plan which are subject to flooding and shall be reviewed annually with respect to such areas.

(b) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, all correlated with the land use element of the plan.

(c) A housing element as provided in Article 10.6 (commencing with Section 65580).

(d) A conservation element for the conservation, development, and utilization of natural resources including water and its hydraulic force, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources. That portion of the conservation element including waters shall be developed in coordination with any countywide water agency and with all district and city agencies which have developed, served, controlled or conserved water for any purpose for the county or city for which the plan is prepared. The conservation element may also cover:

- (1) The reclamation of land and waters.
- (2) Flood control.
- (3) Prevention and control of the pollution of streams and other waters.
- (4) Regulation of the use of land in stream channels and other areas required for the accomplishment of the conservation plan.
- (5) Prevention, control, and correction of the erosion of soils, beaches, and shores.
- (6) Protection of watersheds.
- (7) The location, quantity and quality of the rock, sand and gravel resources.

The conservation element shall be prepared and adopted no later than December 31, 1973.

(e) An open-space element as provided in Article 10.5 (commencing with Section 65560) of this chapter.

(f) A seismic safety element consisting of an identification and appraisal of seismic hazards such as susceptibility to surface ruptures from faulting, to ground shaking, to ground failures, or to effects of seismically induced waves such as tsunamis and seiches.

The seismic safety element shall also include an appraisal of mudslides, landslides, and slope stability as necessary geologic

hazards that must be considered simultaneously with other hazards such as possible surface ruptures from faulting, ground shaking, ground failure and seismically induced waves.

To the extent that a county's seismic safety element is sufficiently detailed containing appropriate policies and programs for adoption by a city, a city may adopt that portion of the county's seismic safety element that pertains to the city planning area within the county's jurisdiction, in satisfaction of this subdivision.

In adopting a county seismic safety element, a city shall follow all requirements regarding the content and adoption of general plan elements as set forth in this article and Article 6 (commencing with Section 65350) of this chapter.

Each county and city shall submit to the Division of Mines and Geology of the Department of Conservation one copy of the seismic safety element and any technical studies used for developing the seismic safety element.

(g) A noise element, which shall recognize guidelines adopted by the Office of Noise Control pursuant to Section 46050.1 of the Health and Safety Code, and which quantifies the community noise environment in terms of noise exposure contours for both near- and long-term levels of growth and traffic activity. Such noise exposure information shall become a guideline for use in development of the land use element to achieve noise compatible land use and also to provide baseline levels and noise source identification for local noise ordinance enforcement.

The sources of environmental noise considered in this analysis shall include, but are not limited to, the following:

- (1) Highways and freeways.
- (2) Primary arterials and major local streets.
- (3) Passenger and freight on-line railroad operations and ground rapid transit systems.
- (4) Commercial, general aviation, heliport, helistop, and military airport operations, aircraft overflights, jet engine test stands, and all other ground facilities and maintenance functions related to airport operation.
- (5) Local industrial plants, including, but not limited to, railroad classification yards.
- (6) Other ground stationary noise sources identified by local agencies as contributing to the community noise environment.

The noise exposure information shall be presented in terms of noise contours expressed in community noise equivalent level (CNEL) or day-night average level (L_{dn}). CNEL means the average equivalent A-weighted sound level during a 24-hour day, obtained after addition of five decibels to sound levels in the evening from 7 p.m. to 10 p.m. and after addition of 10 decibels to sound levels in the night before 7 a.m. and after 10 p.m. L_{dn} means the average equivalent A-weighted sound level during a 24-hour day, obtained after addition of 10 decibels to sound levels in the night before 7 a.m. and after 10 p.m.

The contours shall be shown in minimum increments of 5db and shall continue down to 60db. For areas deemed noise sensitive, including, but not limited to, areas containing schools, hospitals, rest homes, long-term medical or mental care facilities, or any other land-use areas deemed noise sensitive by the local jurisdiction, the noise exposure shall be determined by monitoring.

A part of the noise element shall also include the preparation of a community noise exposure inventory, current and projected, which identifies the number of persons exposed to various levels of noise throughout the community.

The noise element shall also recommend mitigating measures and possible solutions to existing and foreseeable noise problems.

The state, local, or private agency responsible for the construction, maintenance, or operation of those transportation, industrial, or other commercial facilities specified in paragraph 2 of this subdivision shall provide to the local agency producing the general plan, specific data relating to current and projected levels of activity and a detailed methodology for the development of noise contours given this supplied data, or they shall provide noise contours as specified in the foregoing statements.

It shall be the responsibility of the local agency preparing the general plan to specify the manner in which the noise element will be integrated into the city or county's zoning plan and tied to the land use and circulation elements and to the local noise ordinance. The noise element, once adopted, shall also become the guideline for determining compliance with the state's noise insulation standards, as contained in Section 1092 of Title 25 of the California Administrative Code.

(h) A scenic highway element for the development, establishment, and protection of scenic highways pursuant to the provisions of Article 2.5 (commencing with Section 260) of Chapter 2 of Division 1 of the Streets and Highways Code.

(i) A safety element for the protection of the community from fires and geologic hazards including features necessary for such protection as evacuation routes, peak load water supply requirements, minimum road widths, clearances around structures, and geologic hazard mapping in areas of known geologic hazards.

The requirements of this section shall apply to charter cities.

SEC. 3. Article 10.6 (commencing with Section 65580) is added to Chapter 3 of Division 1 of Title 7 of the Government Code, to read:

Article 10.6. Housing Elements

65580. The Legislature finds and declares as follows:

(a) The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order.

(b) The early attainment of this goal requires the cooperative

participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels.

(c) The provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government.

(d) Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.

(e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs.

65581. It is the intent of the Legislature in enacting this article:

(a) To assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal.

(b) To assure that counties and cities will prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal.

(c) To recognize that each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs.

(d) To ensure that each local government cooperates with other local governments in order to address regional housing needs.

65582. As used in this article:

(a) "Community," "locality," "local government," or "jurisdiction" means a city, city and county, or county.

(b) "Department" means the Department of Housing and Community Development.

(c) "Housing element" or "element" means the housing element of the community's general plan, as required pursuant to this article and subdivision (c) of Section 65302.

65583. The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and shall make adequate provision for the existing and projected needs of all economic segments of the community. The element shall contain all of the following:

(a) An assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs. The assessment and inventory shall include the following:

(1) Analysis of population and employment trends and

documentation of projections and a quantification of the locality's existing and projected housing needs for all income levels. Such existing and projected needs shall include the locality's share of the regional housing need in accordance with Section 65584.

(2) Analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition.

(3) An inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.

(4) Analysis of potential and actual governmental constraints upon the maintenance, improvement, or development of housing for all income levels, including land use controls, building codes and their enforcement, site improvements, fees and other exactions required of developers, and local processing and permit procedures.

(5) Analysis of potential and actual nongovernmental constraints upon the maintenance, improvement, or development of housing for all income levels, including the availability of financing, the price of land, and the cost of construction.

(6) Analysis of any special housing needs, such as those of the handicapped, elderly, large families, farmworkers, and families with female heads of households.

(7) Analysis of opportunities for energy conservation with respect to residential development.

(b) A statement of the community's goals, quantified objectives, and policies relative to the maintenance, improvement, and development of housing.

It is recognized that the total housing needs identified pursuant to subdivision (a) may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements outlined in Article 5 (commencing with Section 65300). Under these circumstances, the quantified objectives need not be identical to the identified existing housing needs, but should establish the maximum number of housing units that can be constructed, rehabilitated, and conserved over a five-year time frame.

(c) A program which sets forth a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives, and the utilization of appropriate federal and state financing and subsidy programs when available. In order to make adequate provision for the housing needs of all economic segments of the community, the program shall do all of the following:

(1) Identify adequate sites which will be made available through appropriate zoning and development standards and with public

services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory-built housing and mobilehomes, in order to meet the community's housing goals as identified in subdivision (b).

(2) Assist in the development of adequate housing to meet the needs of low- and moderate-income households.

(3) Address and, where appropriate and legally possible, remove governmental constraints to the maintenance, improvement, and development of housing.

(4) Conserve and improve the condition of the existing affordable housing stock.

(5) Promote housing opportunities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, or color.

The program shall include an identification of the agencies and officials responsible for the implementation of the various actions and the means by which consistency will be achieved with other general plan elements and community goals. The local government shall make a diligent effort to achieve public participation of all economic segments of the community in the development of the housing element, and the program shall describe this effort.

65584. (a) For purposes of subdivision (a) of Section 65583, a locality's share of the regional housing needs includes that share of the housing need of persons at all income levels within the area significantly affected by a jurisdiction's general plan. The distribution of regional housing needs shall, based upon available data, take into consideration market demand for housing, employment opportunities, the availability of suitable sites and public facilities, commuting patterns, type and tenure of housing need, and the housing needs of farmworkers. The distribution shall seek to avoid further impaction of localities with relatively high proportions of lower income households. Based upon data provided by the Department of Housing and Community Development relative to the statewide need for housing, each council of governments shall determine the existing and projected housing need for its region. The Department of Housing and Community Development shall ensure that this determination is consistent with the statewide housing need and may revise the determination of the council of governments if necessary to obtain this consistency. Each locality's share shall be determined by the appropriate council of governments consistent with the criteria above with the advice of the department subject to the procedure established pursuant to subdivision (c).

(b) For areas with no council of governments, the Department of Housing and Community Development shall determine housing market areas and define the regional housing need for localities within these areas. Where the department determines that a local government possesses the capability and resources and has agreed to accept the responsibility, with respect to its jurisdiction, for the

identification and determination of housing market areas and regional housing needs, the department shall delegate this responsibility to the local governments within these areas.

(c) Within 90 days following a determination of a council of governments pursuant to subdivision (a), or the department's determination pursuant to subdivision (b), a local government may revise the definition of its share of the regional housing need. The revised share shall be based upon available data and accepted planning methodology, and supported by adequate documentation. Within 60 days of the local government's revision, the council of governments or the department, as the case may be, shall accept the revision or shall indicate, based upon available data and accepted planning methodology, why the revision is inconsistent with the regional housing need. The housing element shall contain an analysis of the factors and circumstances, with all supporting data, justifying the revision. All materials and data used to justify any revision shall be made available upon request by any interested party within 45 days upon payment of reasonable costs of reproduction unless such costs are waived due to economic hardship.

(d) Any authority to review and revise a local government's share of the regional housing need granted under this section shall not constitute authority to revise, approve, or disapprove the manner in which the local government's share of the regional housing need is implemented through its housing program.

65585. (a) Each city, county, and city and county shall consider the guidelines adopted by the Department of Housing and Community Development pursuant to Section 50459 of the Health and Safety Code in preparation and amendment of the housing element pursuant to this article. Such guidelines shall be advisory to each local government in order to assist it in the preparation of its housing element.

(b) At least 90 days prior to adoption of the housing element pursuant to this article and Section 65357, or at least 45 days prior to the adoption of an amendment to this element, the planning agency of a city, county, or city and county shall submit a draft of the element or amendment to the Department of Housing and Community Development. The department shall review drafts submitted to it and report its findings to the planning agency within 90 days of receipt of the draft in the case of adoption of the housing element pursuant to this article, or within 45 days of receipt of the draft in the case of an amendment. The legislative body shall consider the department's findings prior to final adoption of the housing element or amendment.

(c) Each local government shall provide the department with a copy of its adopted housing element or amendments. The department may review adopted housing elements or amendments and report its findings.

(d) Except as provided in Section 65586, any and all findings made by the Department of Housing and Community Development

pursuant to subdivisions (b) and (c) shall be advisory to the local government.

65586. Local governments shall conform their housing elements to the provisions of this article on or before October 1, 1981. Jurisdictions with housing elements adopted before October 1, 1981, in conformity with the housing element guidelines adopted by the Department of Housing and Community Development on December 7, 1977, and located in Subchapter 3 (commencing with Section 6300) of Chapter 6 of Part 1 of Title 25 of the California Administrative Code, shall be deemed in compliance with this article as of its effective date. A locality with a housing element found to be adequate by the department before October 1, 1981, shall be deemed in conformity with these guidelines.

65587. (a) Each city, county, or city and county shall bring its housing element, as required by subdivision (c) of Section 65302, into conformity with the requirements of this article on or before October 1, 1981. No extension of time for such purpose may be granted pursuant to Section 65302.6, notwithstanding its provisions to the contrary.

(b) Any action brought by any interested party to review the conformity with the provisions of this article of any housing element or portion thereof or revision thereto shall be brought pursuant to Section 1085 of the Code of Civil Procedure; the court's review of compliance with the provisions of this article shall extend to whether the housing element or portion thereof or revision thereto reasonably complies with the requirements of this article.

65588. (a) Each local government shall review its housing element as frequently as appropriate to evaluate all of the following:

(1) The appropriateness of the housing goals, objectives, and policies in contributing to the attainment of the state housing goal.

(2) The effectiveness of the housing element in attainment of the community's housing goals and objectives.

(3) The progress of the city, county, or city and county in implementation of the housing element.

(b) The housing element shall be revised as appropriate, but not less than every five years, to reflect the results of this periodic review, except that the first such revision shall be accomplished by July 1, 1984.

65589. (a) Nothing in this article shall require a city, county, or city and county to do any of the following:

(1) Expend local revenues for the construction of housing, housing subsidies, or land acquisition.

(2) Disapprove any residential development which is consistent with the general plan.

(b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

(c) Nothing in this article shall be construed to be a grant of

authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

(d) The provisions of this article shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.

SEC. 4. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation Code and Section 6 of Article XIII B of the California Constitution, no appropriation is made by this act pursuant to these sections. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of that code.

SEC. 5. Section 2 of this act shall become operative October 1, 1981.

CHAPTER 1144

An act to add Section 669.5 to the Evidence Code, relating to the evidentiary burden of proof.

[Approved by Governor September 26, 1980. Filed with
Secretary of State September 26, 1980]

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares that an adequate supply of housing is necessary for the health, safety, and public welfare of all Californians. The Legislature further finds and declares that local government ordinances which severely restrict the number of housing units which may be constructed have an effect on the supply of housing within the region, may exacerbate the housing market conditions in surrounding jurisdictions, and may limit access to affordable housing within the jurisdiction and in the region. While the Legislature recognizes that, in certain instances, the public health, safety, and welfare warrant enactment of such ordinances, increasing public need for adequate housing requires that local governments properly establish the need for such ordinances and balance the need for such ordinances against the need for new housing opportunities.

SEC. 2. Section 669.5 is added to the Evidence Code, to read:

669.5. (a) Any ordinance enacted by the governing body of a city, county, or city and county which directly limits, by number, (1) the building permits that may be issued for residential construction or (2) the buildable lots which may be developed for residential purposes, is presumed to have an impact on the supply of residential units available in an area which includes territory outside

Westlaw.

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C

Court of Appeal, Second District, Division 2,
 California.

Charles **BOWNDS**, etc., Petitioners and Appellants,
 v.

CITY OF GLENDALE, etc., Respondents;
STEVENSON-DILBECK DEVELOPMENT CO.,
 Glenluca Properties, Jensen Builders,
 Hillwood Development, Gustav Kuhn, Erna Kuhn,
 Real Estate Dynamics, Inc.,
 Sinclair Properties Ltd., The State Department of
 Housing and Community
 Development, Real Parties in Interest.

Civ. 58910.

Dec. 23, 1980.

Rehearing Denied Jan. 9, 1981.

Hearing Denied March 11, 1981.

Proceedings were instituted in mandamus to compel the city council to vacate and set aside all approvals for the conversion of existing apartment houses to condominium ownership. The Superior Court, Los Angeles County, Charles H. Phillips, J., entered judgment denying petition for mandate, and petitioner appealed. The Court of Appeal, Compton, J., held that housing element of master plan of City of Glendale contained an extremely comprehensive analysis of present housing inventory and future need and, given fact that overall plan and its ordinances in area of land use regulation represented an honest and reasonable effort to comply with state's statutory requirements, was not inadequate for failure to discuss in specific terms subject of condominium conversion notwithstanding whether it comported with guidelines of Department of Housing and Community Development promulgated pursuant to state planning and zoning law.

Affirmed.

West Headnotes

[1] Zoning and Planning ⚡3

414k3 Most Cited Cases

Thrust of statutory scheme embodied in state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life; however, local control is at the heart of the process. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[2] Zoning and Planning ⚡672

414k672 Most Cited Cases

[2] Zoning and Planning ⚡681

414k681 Most Cited Cases

Actions of a city with respect to zoning and planning are presumed to be valid and in regular performance of its official duty and burden is on objectant to demonstrate that city has failed to perform a specific duty mandated by law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[3] Zoning and Planning ⚡602

414k602 Most Cited Cases

While a court may conclude that in form and general content, a local zoning plan fails to meet general requirements of statute, a court cannot and should not involve itself in a detailed analysis of whether elements of plan are adequate to achieve its purpose. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[4] Zoning and Planning ⚡721

414k721 Most Cited Cases

In absence of more specific legislation, it would ill-behoove any court to indirectly mandate a specific "action" program under guise of declaring an otherwise complete and comprehensive building and zoning plan to be inadequate, basing its decision on nothing more than a subjective interpretation of nonspecific language. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c),

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65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[5] Zoning and Planning ☞29.5

414k29.5 Most Cited Cases

Housing element of master plan of City of Glendale contained an extremely comprehensive analysis of present housing inventory and future needs and, given fact that overall plan and its ordinances in area of land use regulation represented an honest and reasonable effort to comply with state's statutory requirements, was not inadequate for failure to discuss in specific terms subject of condominium conversion notwithstanding whether it comported with guidelines of Department of Housing and Community Development promulgated pursuant to state planning and zoning law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[6] Zoning and Planning ☞353.1

414k353.1 Most Cited Cases

(Formerly 414k353)

The Department of Housing and Community Development has no authority on its own to compel compliance with funding guidelines according to its own notion of what constitutes compliance. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[7] Constitutional Law ☞62(5.1)

92k62(5.1) Most Cited Cases

(Formerly 92k62(5))

In areas of such critical importance and sensitivity as impairing private property rights and mandating the expenditure of public funds, a delegation of legislative authority to an administrative agency to regulate condominium conversion would violate the doctrine of separation of powers and would be invalid. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459; West's Ann.Const. Art. 1, §§ 1, 19.

[8] Zoning and Planning ☞14

414k14 Most Cited Cases

The decision-making power in area of land use and planning still rests with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state legislature. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[9] Zoning and Planning ☞672

414k672 Most Cited Cases

When any attack is made upon the exercise of the decision-making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency. West's Ann.Gov.Code, § 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[10] Zoning and Planning ☞357

414k357 Most Cited Cases

Guidelines promulgated by the Department of Housing and Community Development pursuant to the state planning and zoning law are not self-executing and do not have the binding effect of law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[11] Condominium ☞2

89Ak2 Most Cited Cases

The subject of conversion of condominiums is of such importance to property owners and tenants alike in California that the authority of a local government to regulate in the area should not hinge on subjective interpretation by courts or administrative boards of the vague or general language to be found in the planning and land use law. West's Ann.Gov.Code, §§ 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

[12] Condominium ☞2

89Ak2 Most Cited Cases

If the Legislature desires to preempt the decision-making power of local governments in the field of regulating condominium conversion, it should specifically say so. West's Ann.Gov.Code, § 6500 et seq., 65040.2, 65302(c), 65860, 66473.5, 66479; West's Ann.Health & Safety Code, § 50459.

***878 **344** Jones & Jones, by Arthur T. Jones, Glendale, for petitioners and appellants.

Frank R. Manzano, City Atty., Peter C. Wright, Asst. City Atty., for respondents.

Melby & Anderson, by Jarrett Anderson, Glendale, for real parties in interest Stevenson-Dilbeck Development Co.

Michael Franchetti, Chief Deputy Atty. Gen., R. H. Connett, Asst. Atty. Gen., Sylvia O. Cano, Deputy Atty. Gen., amicus curiae, for California

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Department of Housing and Community Development.

Carlyle W. Hall, Jr., Los Angeles, for amicus curiae, The Sierra Club.

Selvin & Weiner, Beryl Weiner, Los Angeles, for real party in interest, Sinclair Properties, Ltd.

Roger A. Grable, City Atty., City of Irvine, William H. Keiser, Asst. City Atty., Leonard A. Hampel, Rutan & Tucker, Santa Ana, for amicus curiae, City of Irvine and 45 cities joining herein.

Morton C. Devor, Los Angeles, for real parties in interest Gustav Kuhn and Erna Kuhn.

Alan I. White, Philip W. Green, Drummy, Garrett, King & Harrison, Newport Beach, for real parties in interest Daon Corporation.

Allan M. Kassirer, Selvin & Weiner, Los Angeles, for real party in interest.

COMPTON, Associate Justice.

Proceedings in mandamus to compel the City Council of the City of Glendale (City), inter alia, to vacate and set aside all approvals granted subsequent to July 20, 1978, for the conversion of existing apartment houses to condominium ownership and to declare a moratorium on such conversions pending certain actions by the City in the area of planning which, according to petitioner, are required by law. *879 The State Department of Housing and Community Development (Department) and the Sierra Club have filed amicus curiae briefs in support of petitioner. An amicus brief in support of City and Real Parties in Interest has been filed on behalf of the City of Irvine and 45 other California cities.

Petitioner is a tenant in an apartment building which was approved by City on July 20, 1978, for conversion to condominium ownership. In this action he purports to represent an unincorporated association of tenants who are similarly situated.

The real parties in interest are owners of apartment buildings who, subsequent to July 20, 1978, have applied for and received approval for conversion to

condominiums. The trial court entered judgment denying the petition for mandate. Petitioner has appealed. We affirm.

Code of Civil Procedure section 1085 provides that a writ of mandate may be issued to compel a public official to perform an act which the law specifically requires him to perform. Petitioner contends that City is required by law and should be mandated to perfect what he describes as an "inadequate" general plan and that the failure to take such action renders the City powerless to approve condominium conversions. Hence, according to petitioner, such previously granted approvals must be vacated.

While the immediate goal of petitioner is to prevent the accomplishment of a number of specific condominium conversion projects, the fundamental issue involved is the decision-making power in the area of land use and planning.

Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, Article XI, section 7. [FN1] The exercise of that power **345 has traditionally been accomplished through zoning ordinances and regulation of subdivisions under the State Map Act (formerly Business and Professions Code, section 11500, et seq., now Government Code sections 66410 through 66499.30).

FN1. California Constitution, Article XI, section 7 provides:

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

*880 In recent years the Legislature has enacted a number of statutes as part of the State Planning & Zoning Law, (Gov.Code, s 6500, et seq.) the combined effect of which is to require that cities and counties adopt a general plan for the future development, configuration and character of the city or county and require that future land use decisions be made in harmony with that general plan.

The general plan is required to contain elements dealing with specific areas such as housing, land use and circulation. (Gov.Code, s 65302.) Subdivision

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map approval and zoning decisions must be consistent with the general plan. (Gov.Code, ss 66473.5, 66479 and 65860.)

The Department is authorized to develop and publish guidelines for the preparation of the housing element of the plan (Gov.Code, s 65040.2; Health & Saf.Code, s 50459) and the Office of Planning and Research is authorized to do the same for other elements of the plan (Gov.Code, s 65040.2). The Department's guidelines were promulgated in 1973 and codified in California Administrative Code sections 6300 through 6350.

Except for mandating the development of a plan, specifying the elements to be included in the plan, and imposing on the cities and counties the general requirement that land use decisions be guided by that plan, the Legislature has not preempted the decision making power of local legislative bodies as to the specific contours of the general plan or actions taken thereunder.

As we will discuss, petitioner's contentions in this case, as supported by amicus curiae, if accepted, would result in that decision making power being usurped by the Department or the courts.

These contentions are that the guidelines promulgated by the Department are binding on local governments and have the force of law and that the courts should assume the role of determining the "adequacy" with which a local plan addresses all of the various societal factors.

[1] The thrust of the statutory scheme embodied in the state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life. The statutes make clear, however, that local control is at the heart of process.

***881** Government Code section 65030.1 provides in part:

"The Legislature also finds that decisions involving the future growth of the state, most of which are made and will continue to be made at the local

level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors." (Emphasis added.)

Government Code section 66411 provides in part:

"Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall by ordinance, regulate and control subdivisions for which this division requires a tentative and final or parcel map " (Emphasis added.)

The general plan which a city or county is required to adopt is simply a statement of policy. A general plan or policy, whether it be adopted by governmental entity or private ****346** organization serves to provide a standing consistent answer to recurring questions and to act as a guide for specific plans or programs. (O'Loane v. O'Rourke, 231 Cal.App.2d 774, 42 Cal.Rptr. 283.)

Here the City has adopted a master plan and the housing element, which became mandatory by virtue of an amendment to Government Code section 65302, effective January 1, 1972, was completed by mid-1975. That element was undergoing study and revision commencing in early 1978 and a revision was adopted August 1, 1978. The instant action was not commenced until August 21, 1978.

Since 1954, City has also had an ordinance regulating the design and construction of all phases of subdivision development. In December of 1978, it adopted a specific ordinance dealing with condominium development which is applicable to both new development and conversions.

Petitioner's contention is that the City ordinance regulating condominium conversion is invalid and that any approval of such conversions pursuant thereto is void because the housing element of the general plan is "inadequate." The argument goes

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that any subdivision regulation, including regulation of condominium conversion, cannot be consistent with the general plan as required by Government Code sections *882 66473.5 [FN2] and 66474 [FN3] , if the general plan itself is defective or inadequate.

FN2. Government Code section 66473.5 reads as follows:

"No local agency shall approve a map unless the legislative body shall find that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan required by Article 5 (commencing with Section 65300) of Chapter 3 of Division 1 of this title, or any specific plan adopted pursuant to Article 8 (commencing with Section 65450) of Chapter 3 of Division 1 of this title. P A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in such a plan."

FN3. Government Code section 66474 reads in part as follows:

"A legislative body of a city or county shall deny approval of a final or tentative * * * map if it makes any of the following findings: (a) That the proposed map is not consistent with applicable general and specific plans. (b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans."

Both petitioner and amicus rely heavily on *Save El Toro Assn. v. Days*, 74 Cal.App.3d 64, 141 Cal.Rptr. 282. In that case the Court of Appeal invalidated a city's approval of a subdivision map because the court determined that the city had adopted neither a general plan nor a local open space plan. It was there held that a subdivision could not be consistent with a non-existent plan.

Here, there is no question but what the City of Glendale has adopted a general plan with all of the required elements. The claim is simply that,

according to petitioner, it is "inadequate" because the housing element of the plan does not discuss in specific terms the subject of condominium conversion and that it does not comport with the Department's guidelines, which, in our opinion, are nothing more than the Department's interpretation of the Legislature's desires. We think it important to note that with one exception neither the statutes themselves nor the guidelines make any specific mention of condominium conversion.

While condominiums, since their recent advent in California, have been treated as subdivisions of airspace and thus subject to the same general type of regulation as traditional land subdivision, it is apparent that conversion of an existing apartment building to condominium ownership does not involve the land use considerations inherent in the traditional land subdivision.

In obvious recognition of this distinction the Legislature has exempted condominium conversions from certain requirements applicable to *883 other types of subdivisions. Government Code section 66427.2 provides that condominium conversions, which do not include the addition of new units, are not required to be consonant with the general **347 plan unless that plan contains "definite objectives and policies" relating thereto.

Government Code section 66427, a part of the Subdivision Map Act, exempts condominium projects from a requirement of providing detailed maps of the building being subdivided.

Petitioner and the Department concede that an otherwise adequate general plan need not contain any reference to condominium conversions because such silence implies a finding that conversions pose no obstacle to implementation of the general plan and to require such reference and the procedure that would flow therefrom would be simply a bureaucratic exercise.

What then is the basis for the claim that the City's plan is not otherwise adequate? In short, it is that the City's plan fails to comport with the Department's guidelines which it interprets as requiring an exhaustive inventory of available housing and a "action" program to insure adequate housing for all economic segments of the

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community, and which in light of the housing situation in Glendale, must necessarily include reference to the subject of condominium conversions.

The trial court found, on the basis of evidence presented, that the plan, and more specifically the housing element, was adequate and that no special conditions existed which would make it mandatory for the City to include specific provisions concerning condominium conversions. The trial court also found that in each case the approval of the specific conversion project was consistent with the general plan.

[2] The actions of the City are presumed to be valid and a regular performance of official duty. The burden is on petitioner to demonstrate that the City has failed to perform a specific duty mandated by law.

Planning is at best an inexact science. General plans or policy statements are often semantical exercises which require considerable interpretation on the part of persons charged with implementing them.

In the area of planning and land use the Legislature has promulgated its own general policies and mandated that local governments in turn adopt plans which comport with the Legislature's policies.

[3] ***884** Absent a complete failure or at least substantial failure on the part of a local governmental agency to adopt a plan which approximates the Legislature's expressed desires, the courts are ill-equipped to determine whether the language used in a local plan is "adequate" to achieve the broad general goals of the Legislature. In short, while a court, such as in *Save El Toro Assn. v. Days*, supra, may conclude that in form and general content, a local plan fails to meet the general requirements of the statute, a court cannot and should not involve itself in a detailed analysis of whether the elements of the plan are adequate to achieve its purpose. To do so would involve the court in the writing of the plan. That issue is one for determination by the political process and not by the judicial process.

A perfect example of the problem is presented in

this case. Government Code section 65302(c) states in part that the housing element should contain "standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community. Such element shall consider all aspects of current housing technology, to include provisions for not only site-built housing, but also manufactured housing, including mobilehomes and modular homes."

Petitioner and the Department interpret that language as requiring the cities and counties to affirmatively plan in terms of "who, what and when" for the creation of housing. Implicit in this is the requirement of the expenditure of public funds for the purpose. The City contends there is no legislative mandate to affirmatively acquire or produce housing.

[4] In the absence of more specific legislation, it would ill-behoove any court to indirectly mandate such a specific "action" program under the guise of declaring an otherwise complete and comprehensive plan ****348** to be inadequate, basing its decision on nothing more than a subjective interpretation of such non-specific language.

[5] Contrary to the contention of petitioner, we conclude that the housing element of the City's master plan contains an extremely comprehensive analysis of the present housing inventory and future needs. The City's overall plan and its ordinances in the area of land use regulation represent an honest and reasonable effort to comply with the state's statutory requirements.

***885** Finally, we turn to the contention that the guidelines promulgated by the Department have the effect of law, are binding on the cities and counties and thereby limit the legislative prerogative of the city councils and boards of supervisors.

In our opinion, this is a startling concept indeed. As noted earlier, planning guidelines are developed by two bodies under two separate statutory authorizations. Government Code section 65040.2 specifically provides that the guidelines promulgated by the Office of Planning and Research are advisory only.

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[6] Health and Safety Code section 50459, which provides for the authority of the Department to promulgate guidelines concerning the housing element in local planning, does not, however, specifically declare such guidelines to be advisory only. The statute does, however, authorize that department to review local housing elements for conformity with Government Code section 65302 and report its findings. The clear implication is that the Department has no authority on its own to compel compliance according to its own notion of what constitutes compliance. The term "guidelines" itself suggests an absence of compulsion.

To carry the argument to its logical extreme, if the Department could promulgate regulations or guidelines having the effect of law it could simply adopt a regulation banning all condominium conversions or spelling out the Department's own regulatory scheme. Further, the Department could, according to its interpretation of the statute, require public funding for housing developments.

[7] In regulating condominium conversion or, in fact, in regulating land use generally, the police power is in direct confrontation with Article I, section 1 of the California Constitution (right to acquire or possess property) and Article I, section 14 (prohibition against the taking of private property without just compensation). In areas of such critical importance and sensitivity as impairing private property rights and mandating the expenditure of public funds, a delegation of legislative authority to an administrative agency would violate the doctrine of separation of powers, Article I, section 14 and would be invalid.

[8][9] In summary, the decision making power in the area of land use and planning still rests with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state *886 Legislature. When any attack is made upon the exercise of that decision making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency.

[10][11][12] Guidelines promulgated by the Department are not self-executing and do not have the binding effect of law. The subject of conversion of condominiums is of such importance to property

owners and tenants alike that the authority of the local government to regulate in the area should not hinge upon subjective interpretation by courts or administrative boards of the vague or general language to be found in the planning and land use law. If the Legislature desires to preempt the decision making power of local governments in the field, it should specifically say so.

Our conclusion is borne out by the fact that since the commencement of this action, the Legislature has enacted AB 2853, which amends Government Code section 65302 and adds Article 10.6 to Chapter 3 of Division 1 of Title 7 of the Government Code.

The effect of this legislation is to codify many of the provisions of the Department's **349 former guidelines, and to require compliance by October 1, 1981. The new enactment specifically provides that any guidelines or findings adopted by the Department are advisory only, and that judicial review of a local plan be limited to a determination of whether there is "reasonable compliance" with the statutes.

This indicates to us a recognition by the Legislature that the Department's guidelines have always been advisory only, that any such drastic impairment of the legislative prerogative of local government should be undertaken only by specific legislative action and judicial review for compliance be limited in scope.

The judgment is affirmed.

FLEMING, Acting P. J., and BEACH, J., concur.

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C

RICHARD P. STEVENS et al., Plaintiffs and
 Appellants,
 v.
 CITY OF GLENDALE et al., Defendants and
 Respondents; HENSLER-MacDONALD, Real
 Party in Interest and Respondent.

Civ. No. 60299.

Court of Appeal, Second District, Division 5,
 California.

Oct 27, 1981.

SUMMARY

An individual and an organization instituted a mandamus proceeding against a city and its city council, alleging that the city's general plan and the housing element contained therein were illegal. Plaintiffs also challenged the legality of an environmental impact report (EIR) which pertained to a proposed housing subdivision and sought to have set aside a notice of determination regarding the EIR and related subdivision. As to the general plan and its housing element, the trial court determined that they complied with the Planning and Zoning Law (Gov. Code, § 65302). As to the EIR, the final version of which included new plans for the extension of an existing street, the trial court determined that public notice should have been given before its adoption. Accordingly, the trial court granted a writ of mandate requiring city officials to vacate the notice of determination and approval of the tentative tract map and to resume proceedings by providing public notice of the proposed revisions to the EIR. Plaintiffs' requests for attorney fees and costs were denied. (Superior Court of Los Angeles County, No. C269101, Charles H. Older, Judge.)

The Court of Appeal affirmed. The court held that substantial evidence supported the trial court's determinations with respect to the general plan and

its housing element, noting that it contained standards and plans for the improvement of housing and for adequate housing sites and made adequate provisions for the housing needs of all economic segments of the community. The court also held that public notice was required before adoption of the final, revised EIR, but that it was premature to require the preparation of a supplemental report. As to plaintiffs' request for attorney fees pursuant to the private attorney general doctrine (Code Civ. Proc., § 1021.5), the court held that they were *987 properly denied, since it could not be said that a significant benefit had been conferred on the general public or a large class of persons. In so holding, the court noted that plaintiffs had prevailed only on a technical point. Finally, the court held that plaintiffs were not entitled to their costs (Code Civ. Proc., § 1032), since the issues on which they had prevailed were not substantial when compared to the many requests for relief which were denied. (Opinion by Sheldon, J., [FN*] with Ashby, Acting P. J., and Hastings, J., concurring.)

FN* Assigned by the Chairperson of the
 Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Zoning and Planning § 10--Content and Validity of Zoning Ordinances, Planning Enactments and Orders--Comprehensive Zoning--Validity of General Plan.

In a mandamus proceeding challenging the legal sufficiency of a city's general plan and the housing element contained therein, substantial evidence supported the trial court's determinations that the plan and its housing element complied with Gov. Code, § 65302 (setting forth required elements of general plan), as of the time of the approval of the revised tentative tract map at issue, where it contained standards and plans for the improvement of housing and for adequate housing sites and made adequate provisions for the housing needs of all economic segments of the community. In addition,

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when read as a whole, the housing element coordinated with the other elements of the general plan and complied with the housing element administrative guidelines (Cal. Admin. Code, tit. 25, § 6300 et seq.).

(2) Zoning and Planning § 10--Content and Validity of Zoning Ordinances, Planning Enactments and Orders--Comprehensive Zoning--Advisory Nature of Housing Element Guidelines.

While the Planning and Zoning Law (Gov. Code, § 65000 et seq.), makes it mandatory for counties and cities to adopt a general plan which includes a housing element (Gov. Code, § 65302, subd. (c)), the housing element guidelines promulgated pursuant to such law are advisory and are not binding on communities. *988

(3) Zoning and Planning § 30--Conditional Uses; Permits and Certificates-- Judicial Review--Validity of Environmental Impact Report--Failure to Give Public Notice of Final Report.

In a mandamus proceeding challenging the legality of an environmental impact report (EIR) and seeking to set aside a city council's certification thereof, substantial evidence supported the trial court's finding that public notice was not given with respect to the final EIR, which included new plans for the extension of an existing street. Thus, the trial court properly entered judgment requiring local authorities to resume proceedings by providing notice to the public of the proposed revisions to the EIR. However, it was premature to require the preparation of a subsequent or supplemental EIR (Pub. Resources Code, § 21166).

[See **Cal.Jur.3d**, Pollution and Conservation Laws, § 393; **Am. Jur.2d**, Pollution Control, § 46 et seq.]

(4) Costs § 7--Amount and Items Allowable--Attorney Fees--Private Attorney General Doctrine.

In a mandamus proceeding challenging the legality of an environmental impact report and seeking to set aside a city council's certification thereof, the trial court properly denied plaintiffs' request for attorney fees pursuant to Code Civ. Proc., § 1021.5 (private attorney general doctrine), where plaintiffs prevailed only on a technical point and where they did not present adequate evidence that a public

interest was affected. Thus, it could not be said that a significant benefit had been conferred on the general public or a large class of persons.

(5) Costs § 2--Right to Costs--When Plaintiff Receives Only Partial Recovery.

In a mandamus proceeding challenging the legality of an environmental impact report and seeking to set aside a city council's certification thereof, the trial court did not abuse its discretion in denying plaintiffs' request for costs (Code Civ. Proc., § 1032) , where the issues on which plaintiffs prevailed were not substantial when compared to the many requests for relief which were denied.

COUNSEL

Jones & Jones and Arthur T. Jones for Plaintiffs and Appellants. *989

Frank R. Manzano, City Attorney, and Dennis H. Schuck, Senior Assistant City Attorney, for Defendants and Respondents.

Davis, Tharp & Berg and Richard G. Berg for Real Party in Interest and Respondent.

SHELDON, J [FN*]

FN* Assigned by the Chairperson of the Judicial Council.

Richard P. Stevens and Chevy Chase Estates Association were the petitioners below and are the appellants. City of Glendale, Glendale City Council and individual members thereof are the respondents. Hensler-MacDonald, a joint venture, is the real party in interest (RPI).

Appellants filed a petition for writ of mandate and alternative writ of mandate pursuant to Code of Civil Procedure section 1085 wherein they sought to challenge the legal sufficiency of the City of Glendale's general plan and the housing element contained therein. In addition, pursuant to Code of Civil Procedure section 1094.5, they also challenged the legality of environmental impact report (EIR) No. 77-28, pertaining to tentative tract No. 32844 as adopted December 12, 1978, and sought to have set aside the notice of determination recorded on December 18, 1978, regarding this EIR

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and the related subdivision. In this respect, the appellants sought to compel the city to reopen its hearing on the EIR and publish a final EIR in conformity with the California Environmental Quality Control Act (CEQA) of 1970 and the guidelines published in support thereof.

Appellants also filed a petition for attorneys' fees and costs.

The trial court signed a judgment granting the peremptory writ of mandate as to a particular aspect of the proceedings, to be discussed below. The request for attorneys' fees and costs were denied.

Appellants appeal from this judgment and the order denying attorneys' fees and costs. *990

Facts

On March 25, 1977, the RPI filed its application for approval of tentative subdivision map No. 32844 involving originally the construction of 830 single family residences on 309 acres of undeveloped hillside canyons in the San Rafael Hills section of Glendale.

On June 13, 1978, a notice of completion of a draft EIR (No. 77-28) was filed with the Secretary for Resources of the State of California. The draft EIR was made public on that date and public comment was solicited.

Respondents transmitted copies of the draft EIR to all responsible and interested agencies, including appellants, and also transmitted summaries of the draft EIR to 218 property owners within 300 feet of the proposed project.

On October 10, 1978, a joint public hearing on the draft EIR was held before the city council and the Environmental and Planning Board (EPB) of the City of Glendale. Adequate notice of this meeting was given, and public comment was orally received. After the hearing, the city council referred the project back to the EPB for further recommendations.

The EPB at its meeting on November 8, 1978, adopted the following "proposed mitigation measures": (1) That 'A' Street be extended from the

northerly boundary of the project site to connection [sic] with Camino San Rafael in Tract No. 31772, also known as the Emerald Isle Tract; (2) That the primary ridgeline in the project be retained in a natural state; and (3) That the number of housing units in the project be reduced."

On November 20, 1978, the RPI submitted to the planning department a revised tentative tract map which provided for the required mitigation measures. Based upon this revised tentative tract map and the independent evaluation and analysis of the environmental impacts by its staff, the EPB on November 29, 1978, submitted a proposed final EIR to the city council.

On December 12, 1978, the city council held a hearing on the final EIR, but did not give public notice of the revision extending "A" Street *991 to the Emerald Isle tract. However, appellants and their attorney were present at the meeting and objected to the sufficiency of the EIR because it did not subject the extension of "A" Street to the Emerald Isle tract to public review.

The trial court found that this "extension of 'A' Street constituted a change in the project which required major revisions to the EIR due to the involvement of new environmental impacts not considered in the draft EIR, said revisions were incorporated in the final EIR."

Because of the failure to give the public notice, the trial court found that respondents had prejudicially abused their discretion, and accordingly, granted the writ of mandate commanding respondents to:

"1. Vacate and set aside the notice of determination recorded on or about December 18, 1978 with respect to the certification of Environmental 600 Impact Report No. 77-28 pertaining to tentative tract map No. 32844.

"2. Vacate and set aside its approval of tentative tract map No. 32844.

"3. To resume proceedings to process EIR No. 77-28 by providing notice to the public of the major revisions to the EIR due to the involvement of new environmental impacts not considered in the draft EIR and to give the public reasonable opportunity

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to review and comment on said EIR prior to certification and *otherwise comply with CEQA* (italics added) and the State Guidelines.

"4. To refrain from approving revised tentative tract map No. 32844 until it has complied with the requirements of CEQA."

As to the approval of the subdivision itself, adequate public notice was given, as well as notice to the appellants, and an opportunity for them to be heard. Approval of tentative tract No. 32844 was given at a council meeting on December 12, 1978.

The trial court found that respondents had proceeded according to the requirements of the Subdivision Map Act in approving tentative tract No. 32844 except as stated above in the final approval of the EIR. *992

I

(1) Does the Glendale general plan contain all of the legally required elements, and is the Glendale housing element contained therein legally sufficient?

The Legislature has gathered the land use laws under a single title of the Government Code entitled "Planning and Land Use." [FN1]

FN1 Government Code section 65302 provides: "The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals. The plan shall include the following elements: ... [¶] (c) A housing element, to be developed pursuant to regulations established under Section 41134 of the Health and Safety Code, consisting of standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community."

The State Department of Housing and Community Development was authorized to develop and publish guidelines for the preparation of the housing

element of the plan. This department's guidelines were promulgated in 1973 and codified in California Administrative Code, title 25, sections 6300 through 6350.

In March of 1972 the City of Glendale adopted the 1990 open space recreation and conservation elements of the Glendale general plan with additional elements added from time to time, including the adoption of the housing element on July 15, 1975, and amended on August 1, 1978.

Appellants quoted from the case of *O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774 at page 785 [42 Cal.Rptr. 283] in characterizing the general plan as follows: "The adoption of the general plan is, in effect, the adoption of a policy, and in many respects, entirely new policy. The plan is of permanent and general character, it is a declaration of public purpose and, as such, supposedly sets forth what kind of a city the community wants and, supposedly, represents the judgment of the electors of the city with reference to the physical form and character the city is to assume."

The housing element guidelines (Cal. Admin. Code, tit. 25, §§ 6300-6350) contain the following provisions: "6310. Scope and Goals. At least four broad goals of a housing element have been identified. The *993 goals listed below may be expanded to include others of local concern and impact.

"(a) To promote and insure the provision of adequate housing for all persons regardless of income, age, race, or ethnic background.

"(b) To promote and insure the provision of housing selection by location, type, price and tenure.

"(c) To promote and insure open and free choice of housing for all.

"(d) To act as a guide for municipal decisions and how these decisions affect the quality of the housing stock and inventory."

Section 6340 provides that other elements must be correlated with the housing element, including the following: Land use, circulation, noise, open space, conservation and seismic safety.

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The housing element of the City of Glendale, adopted July 15, 1975, lists as its goals the following: (1) Expand the range of housing opportunities for every Glendale citizen; (2) improve the quality of the city's housing supply; (3) establish free access of all persons to all types of housing without restrictions based on race, color, creed, sex or national origin; (4) ensure that new housing enhances the total environment and family life styles. The objectives for each goal are set forth in the elements.

Data representing the major overall physical, social and economic findings associated with Glendale's housing is reported in detail.

The following are the areas of a detailed analysis and their mitigation measures: (1) Air quality, (2) water/earth resources, (3) biological resources, (4) noise, (5) urban development, (6) service systems, (7) public facilities, (8) parks and recreation, (9) archaeological and historic resources, (10) community attitudes, (11) social, (12) economics, (13) aesthetics, (14) energy, (15) traffic and transportation.

Problems which were noted in the above areas were mitigated by the reduced number of units, more park area, dedication of land for a school, maintaining the ridgeline, and the extension of "A" Street. *994

The housing element analyzes the housing problem issues in Glendale and makes recommendations for solution of the problems. The element also includes a breakdown of the city by communities, with an inventory and analysis of the housing units in each community. Proposed recommendations are set forth for each community.

An amendment to the housing element was adopted July 17, 1978, which further expanded the goals of the element. When read as a whole, the housing element coordinates with the other elements of the Glendale general plan and complies with the housing element guidelines.

The 1990 open space, recreation and conservation element "has as its primary consideration the existing and proposed public land available to the city's residents. A review of the number and

location of commercial and quasi-public recreational facilities is also included to point out the extent of the private supply of open space and recreational opportunities. These vary from golf courses to church activities."

The project, which is the subject of this action, is located in the community designated as "the San Rafael Hills." The open space plan states: "One of the priorities for the San Rafael Hills, as for the Verdugo Mountains, will be the preservation of the ridge lines." Included in the final map of the project, in addition to expanded park areas and recreation areas, was the ridge all of which was left as open space.

In the housing element the land through which the extension of "A" Street would go was designated for either acquisition or *regulation*. The mitigation measure which required the extension of "A" Street through a V-cut in the ridge line specified in detail how the slopes should be cut, the kind of landscaping to be allowed, and the type of review to be conducted by the public works division and geologist. It further regulated the size, shape, width, grade and contours of the cut as well as other details.

The open space element provides for methods for open space and conservation preservation and contains the following provision: "Open spaces can be controlled through regulatory means including zoning and subdivision control."

The draft EIR, which was prepared by Olson Laboratories, a privately employed company, contained an extensive analysis of the traffic *995 volume, its flow and impact on the different areas. The report concluded that a third access point was crucial. The extension of "A" Street would mitigate this problem. However, the environmental effects of this extension as part of the final EIR were never noticed for a hearing. Accordingly, input from responsible agencies and from the public was not obtained. Potential effects of the extension of "A" Street could be (1) additional traffic use; (2) increase in ambient noise; (3) exposure of people or structures to major geologic hazards; and (4) disruption or division of the physical arrangement of an established community.

The draft EIR considered the following alternatives

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to the project: (1) No project alternative; (2) filled area alternative; (3) clustered development alternative; (4) ridgetop preservation alternative.

In selecting an alternative, CEQA guidelines require that the agency outline specific social, physical, or economic reasons why alternative projects which minimize significant adverse effects cannot be implemented. The draft EIR analyzes the filled area, clustered and ridgetop preservation alternatives, but does not do so for the no project alternative.

Public Resources Code section 21002 provides: "The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."

After preparation of the draft EIR, mitigation measures were adopted by the EPB as indicated above and were incorporated in the revised tentative tract map. These mitigation measures substantially lessened or avoided significant adverse environmental effects of the project.

County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185 [139 Cal.Rptr. 396], held that where the EIR failed to include a genuine *996 "no project" alternative, the EIR did not comply with CEQA. However, in *Inyo*, the EIR did not fully or fairly describe the project that was in fact involved. *Laurel Hills Homeowners Assn. v. City Council* (1978) 83 Cal.App.3d 515, at page 521 [147 Cal.Rptr. 842], held that under CEQA, "if the feasible mitigation measures substantially lessen or avoid generally the significant adverse

environmental' effects of a project, the project may be approved without resort to an evaluation of the feasibility of various project alternatives contained in the environmental impact report." The act "does not mandate the choice of the environmentally best feasible project if through the imposition of feasible mitigation measures alone the appropriate public agency has reduced environmental damage from a project to an acceptable level."

The draft EIR identified a "no project" alternative but did not give an analysis of it. It is noted that the requirements of Public Resources Code sections 21002 and 21002.1 are alternative rather than conjunctive requirements. Therefore, since feasible mitigation measures were proposed and adopted, as indicated above, the requirements of CEQA in this respect were met.

It is the decision of this court that there was substantial evidence, including that discussed above, introduced at the trial to support the trial court's determination that the respondent's general plan complies with all of the provisions of Government Code section 65302. The evidence further upholds the trial court's determination that the housing element at the time of the approval of the revised tentative tract map No. 32844 complies with Government Code section 65302, subdivision c, and its guidelines, and contains standards and plans for the improvement of housing and for adequate sites for housing and makes adequate provisions for the housing needs of all economic segments of the community of Glendale.

Although it is not binding on this court, the decision in *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875 [170 Cal.Rptr. 342], also upheld the legality and sufficiency of this same Glendale housing plan and housing element.

II

(2) Are the housing element guidelines merely advisory and not binding upon communities? *997

As decided above, the Glendale general plan and the housing element are valid under the law; however, appellants raised the question that the guidelines are binding on the local agencies and are not merely advisory.

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While California's Planning and Zoning Law, Government Code section 65000 et seq., makes it mandatory for counties and cities to adopt a general plan, it makes the guidelines for the preparation and content of the elements required in the general plan advisory.

Government Code section 65040.2 states in part: "For purposes of this section, the guidelines prepared pursuant to Section 41134 [subsequently reenacted as Health and Safety Code section 50459] of the Health and Safety Code shall be the guidelines for the housing element required by Section 65302." and states further that such "*guidelines shall be advisory* to each city and county in order to provide assistance in preparing and maintaining their respective general plans." [FN2] (Italics added.) This statement is reiterated in Assembly Bill No. 2853 (Gov. Code, § 65585) to become operative October 1, 1981.

FN2 The housing element guidelines, pursuant to the authority granted in Health and Safety Code section 41134, are promulgated in title 25, California Administrative Code, subchapters 3 and 4, section 6300 et seq., section 6400 et seq.

The advisory nature of the guidelines is reflected in the holdings of two unpublished cases of California appellate courts: *Lennard v. City of El Centro* (Jan. 5, 1977) 1 Civ. No. 34762 and *Save Julland Canyon Committee v. Planning Commission of the City of San Diego* (Jan. 5, 1977) 4 Civ. No. 14780. There is no logical reason to give the housing element the weight of binding law and leave the other elements merely advisory.

The appellant contends that the guidelines for the housing element mandate a specific "action" program. In other words, appellant contends that the provisions of Government Code section 65302, subdivision (c), regarding the housing element requires the cities and counties to affirmatively plan in terms of "who, what and when" for the creation of housing.

A review of the housing element of the City of Glendale presents a comprehensive analysis of the present housing inventory and future *998 needs. This issue was presented and discussed in *Bownds*

and the court in that decision aptly stated: "In the absence of more specific legislation, it would ill-behoove any court to indirectly mandate such a specific 'action' program under the guise of declaring an otherwise complete and comprehensive plan to be inadequate, basing its decision on nothing more than a subjective interpretation of such nonspecific language."

We hold that the housing element guidelines are merely advisory.

III

(3) Did the revision of the project by the extension of "A" Street require the preparation of a subsequent or supplemental EIR?

Public Resources Code section 21166, as amended, provides as follows: "When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: [¶] (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report. [¶] (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."

There is substantial evidence in the record, discussed in part above, to uphold the trial court's finding that "Between the date of the filing of the application for a subdivision by the RPI and the certification of the EIR No. 77-28 by the City Council, the respondents proceeded in a manner provided by the California Environmental Quality Act (CEQA) and the Guidelines and regulations adopted pursuant thereto" except that public notice was not given on the final EIR which included the extension of "A" Street. The evidence in the record discloses that there was extensive public consultation and input from both public agencies and concerned citizens as required by CEQA.

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The peremptory writ which the trial court granted ordered the respondents to: *999

"(1) Vacate and set aside the notice of determination recorded on or about December 18, 1978 with respect to the certification of Environmental 600 Impact Report No. 77-28 pertaining to tentative tract map No. 32844.

"(2) Vacate and set aside its approval of tentative tract map No. 32844.

"(3) To resume proceedings to process EIR No. 77-28 by providing notice to the public of the major revisions to the EIR due to the involvement of new environmental impacts not considered in the draft EIR and to give the public reasonable opportunity to review and comment on said EIR prior to certification and otherwise comply with CEQA and the State Guidelines.

"(4) To refrain from approving revised tentative tract map No. 32844 until it has complied with the requirements of CEQA."

Thus, the effect of the trial court's judgment is to require respondents to go back to the point where the draft EIR was approved, give notice to the public of the proposed revisions to the EIR. At that time, interested parties will have the opportunity to review and comment on the draft EIR. If, at that time it does appear that substantial changes are proposed which will require major revisions of the EIR, then a subsequent or supplemental EIR will be required and a hearing held thereon. The certification of the EIR was vacated and, therefore, the EIR process has not been completed. To require a subsequent or supplemental EIR at this time is premature.

IV

Attorney's Fees and Costs

(4)Based upon the discussion by the California Supreme Court in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917 [154 Cal.Rptr. 503, 593 P.2d 200] the issue of attorney's fees is predicated on the authority contained in Code of Civil Procedure section 1021.5. The Legislature adopted Code of Civil Procedure section 1021.5 in 1977 authorizing awards of

attorney fee under the attorney general doctrine as a codification of the private attorney general doctrine *1000 that had been developed in numerous prior judicial decisions. [FN3] The trial court, then, had the discretion to award attorneys' fees to a successful party in an action which resulted in the enforcement of an important right affecting the public interest if a significant benefit has been conferred on the general public or a large class of persons.

FN3 Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor."

The award for attorneys' fees is for a decision which results in the enforcement of an *important* right affecting the public interest. The appellants asserted in their petition violations of what could be deemed "important " rights; however, they prevailed only on a technical point of lack of public notice on the final EIR. Further, appellants did not present adequate evidence that a public interest was affected. The affected parties were adjoining neighbors. The appellants did receive adequate notice of the revised tentative tract map which included the proposed extension of "A" Street. An adjudication was made by the trial court on the issues of the important rights contrary to appellants' requests. This adjudication was supported by findings which in turn were based on substantial evidence. Accordingly, as to the present posture of the case it cannot be said that a significant benefit has been conferred on the general public or a large class of persons.

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(5) Appellants requested costs to be awarded pursuant to the authority of Code of Civil Procedure section 1032. [FN4]

FN4 Code of Civil Procedure section 1032, subdivision (a), state: "To a plaintiff upon a judgment in his favor; in an action for the recovery of real property; in an action to recover the possession of personal property; in an action for the recovery of money or damages; in a special proceeding; in an action which involves the title or possession of real estate or the legality of a tax, impost, assessment, toll, or municipal fine."

Costs will be allowed to a plaintiff upon a judgment in his favor or "if he receives a substantial though partial recovery," 4 Witkin, California Procedure (2d ed. 1971) at page 3246. In the instant case the issues on which appellants prevailed were not "substantial" when compared to the many requests which were denied. The trial court did not abuse its discretion ***1001** in denying costs and its order is supported by substantial evidence.

The judgment is affirmed.

Ashby, Acting P. J., and Hastings, J., concurred.
***1002**

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WAYNE L. FERDIG, Plaintiff and Appellant,
 v.
 STATE PERSONNEL BOARD et al., Defendant
 and Respondent.

Sac. No. 7823.

Supreme Court of California

May 8, 1969.

HEADNOTES

(1) Civil Service § 4.5--Veterans' Preferences.

A civil service applicant was not entitled to any veterans' preference credits under Gov. Code, § 18973, providing therefor and defining veteran, where his service in the merchant marine did not satisfy the statutory service requirement specified as essential for a veterans' preference.

Character of service or connection with military or naval service necessary to entitle one to benefit of veterans' preference statute in relation to civil service, note, 87 A.L.R. 1002. See also **Cal.Jur.2d**, Civil Service, § 14; **Am.Jur.2d**, Civil Service, §§ 26, 27.

(2) Civil Service § 4.5--Veterans' Preferences.

In the context of civil service, authority to determine the allowance of veterans' preferences emanates from the California Constitution (Cal. Const., art. XXIV, § 7) and has been in turn conferred by the Legislature upon the Department of Veterans Affairs (Gov. Code, § 18976); the department is charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference and in carrying out this responsibility it must make its determination in accordance with the statute allowing additional credit to veterans (Gov. Code, § 18973), but the veteran has some responsibility in presenting proof of eligibility to the department (

Gov. Code, § 18976).

(3a, 3b, 3c) Civil Service § 4.5--Veterans' Preferences.

The appointment of a state civil service applicant was void, and the State Personnel Board had jurisdiction to revoke it and to remove the appointee from *97 his position, where his right to appointment was dependent on veterans' preference credits and the appointment had been made as a consequence of the applicant's erroneous representation to the Department of Veterans Affairs that he was a veteran when in fact he was not.

(4) Civil Service § 3--Constitutional and Statutory Provisions.

The action of the Department of Veterans' Affairs invoked by a request for veterans' preference credits is an integral part of the civil service system established by the People and implemented by the Legislature through the State Civil Service Act; the system is grounded on the constitutional mandate that permanent appointments and promotion in the state civil service shall be based upon merit, efficiency and fitness as ascertained by competitive examination; the Legislature has provided a detailed method of carrying out the constitutional mandate, so that appointments shall be based upon merit and fitness.

(5) Civil Service § 4.5--Veterans' Preferences.

Where a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credit, the Department of Veterans' Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) Administrative Law § 37--Validity of Administrative Action--Compliance With Constitutional and Statutory Provisions.

Administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute; and an administrative agency must act within the powers

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conferred upon it by law and may not validly act in excess of such powers.

See **Cal.Jur.2d**, Administrative Law, § 63;
Am.Jur.2d, Administrative Law, § 188.

(7) Civil Service § 1--State Personnel Board.

The State Personnel Board is a body of special and limited jurisdiction and has no powers except such as the law of its creation has given it.

(8) Civil Service § 3--Constitutional and Statutory Provisions.

The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Cal. Const., art. XXIV, § 3, which directs that the board shall administer and enforce the civil service laws, and its authority is governed by the Constitution as well as by the Civil Service Act.

See **Cal.Jur.2d**, Civil Service, § 5.

(9) Civil Service § 12(2)--Discharge, Demotion, Suspension and Dismissal-- Hearing--State Personnel Board.

The State Personnel Board was *98 within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully, though in good faith, made based on unauthorized veterans' preference credits, where the board received the prompt and full cooperation of the Department of Veterans' Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the department only a month after the applicant's appointment, and an objection was made to the board approximately three months later, and where both agencies promptly reviewed the matter.

(10) Civil Service § 10--Discharge, Demotion, Suspension and Dismissal-- Grounds.

Gov. Code, § 19173, providing for rejection of probationers for certain deficiencies, was not intended to cure any defect in certification and appointment deriving from violation of the civil service statutes, and its provisions for rejection of a civil service appointee during a probationary period were inapposite, where the applicant's separation

from a position to which he sought reinstatement was effectuated under the implied power of the State Personnel Board to rectify appointments made in violation of the civil service laws in appointing the applicant, who was qualified for the position in question by passing the examination, but not eligible to be certified for the position.

(11) Civil Service § 12(1)--Hearing--Time for Protest.

It was not necessary that a protestor of a civil service appointment file an "appeal" to the State Personnel Board within the time limits prescribed by its rules where the board, upon the matter being called to its attention, had jurisdiction to review and correct its initial action based on allowance of unauthorized veterans' preference credits by which a civil service applicant improperly secured eligibility for certification and appointment; and, in any event, the protest was timely made where 15 days thereafter the Department of Veterans' Affairs formally notified the personnel board that the applicant's veterans' preference had been "removed."

SUMMARY

APPEAL from a judgment of the Superior Court of Sacramento County. Mamoru Sakuma, Judge. Affirmed.

Proceeding in mandamus to compel the State Personnel Board to set aside its order revoking an appointment to a civil service position. Judgment denying writ affirmed.

COUNSEL

Walter W. Taylor for Plaintiff and Appellant. *99

Thomas C. Lynch, Attorney General, William M. Goode and Robert Burton, Deputy Attorneys General, and Harry T. Kaneko for Defendants and Respondents.

SULLIVAN, J.

This is an appeal from a judgment denying a writ of mandate to compel respondent State Personnel Board (Board) [FN1] to set aside and annul its order revoking the appointment of appellant Wayne L. Ferdig to a state civil service position, and to

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reinstate appellant in said position.

FN1 Respondents named in the court below were the following: (a) The Board and members Joseph L. Wyatt, Jr., Robert S. Ash, May Layne Bonnell, Ford A. Chatters and Samuel Leask, Jr.; (b) Theodore J. Walas; Frederick Granberg and Murray J. Hunter, three individuals entitled to certification for the position involved on the alleged ground that appellant's certification was illegal; and (c) nine individuals ranking above appellant on the employment list on the alleged ground that the allowance of veterans' preference credits to appellant was illegal. The record discloses that only those named in (a) and (b) appeared in the court below. Respondents named in (a) have appeared in this court through the Attorney General; respondent Walas did not file a brief herein but appeared by counsel at oral argument; the other respondents have not appeared herein.

The facts are not in dispute and, as disclosed by the trial court's findings and the documents in the record, are as follows: On May 14, 1962, appellant was appointed to the class of Refrigeration Engineman with no veterans' preference requested or applied to his score. On March 12, 1963, he was transferred to the class of Office Building Engineer.

On July 20, 1963, appellant took an examination for class of Chief Engineer II in the Department of General Services and the employment list established on October 1, 1963, ranked him as number 16. On October 17, 1963, he applied to the Department of Veterans Affairs (Department) for a veterans' preference, presenting a certificate of discharge. This document was issued by the United States Naval Service and certified in substance that appellant, described therein as "Apprentice Seaman, Class M-1" had been honorably discharged from said service. It indicates on its face appellant's service in the United States Naval Reserve, as distinguished from the United States Navy; another document in the record refers to appellant's service as "war-time service in the merchant marine." As a result of said presentation, the Department of Veterans Affairs notified the Board that veterans'

preference points were applicable to appellant's score, thereby moving appellant up to number 4 on the list.

As a result of a waiver by a person ahead of him, appellant then became one of the top three on the list and thus eligible *100 for appointment. On August 24, 1964, he was appointed to the position of Chief Engineer II. Without the addition of veterans' points, he would not have been within the top three on the list.

On September 25, 1964, the question was raised with the Department of Veterans Affairs as to whether the application of veterans' preference points to appellant's case was proper. The Department then requested appellant to resubmit the documents supporting his claim therefor. On November 9, 1964, approximately nine weeks after appellant's appointment to the position, the Department advised appellant that his application for the points had been approved erroneously. Appellant objected to this determination and the Department directed an inquiry to the appropriate federal agency as to whether appellant's service and training in the Naval Service was considered active duty in the armed forces of the United States.

On January 4, 1965, an officer of Local 411 of the Union of State Employees, by letter to the Board, questioned the legality of appellant's appointment as Chief Engineer II. Shortly thereafter the Judge Advocate of the Department of the Navy advised the Department of Veterans Affairs that appellant had performed no active duty or other active naval service. The latter Department thereupon notified both appellant and the Board that it had removed appellant's veterans' preference. On April 9, 1965, the Board, after a hearing, made its order revoking appellant's appointment "from the beginning."

The trial court, concluding that the Board had acted lawfully, denied appellant's petition for a peremptory writ of mandate and discharged the alternative writ theretofore issued. This appeal followed.

Appellant makes no claim before us that he is, or ever was, a veteran as that term is used in Government Code section 18973 [FN2] which provides for additional credits for veterans attaining

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passing marks in specified examinations. Essentially he advances two contentions: First, that the jurisdiction of the Board to remove civil service employees is expressly limited by statute and appellant's removal was not authorized by any statute; and second, that although the Board's action in crediting him with veterans' preference points was erroneous, *101 it had nevertheless become final and the Board was without jurisdiction to reconsider or correct it.

FN2 Hereafter, unless otherwise indicated, all section references are to the Government Code.

We turn first to the circumstances of appellant's appointment. The record before us establishes without any contradiction that appellant was not entitled at any time to the veterans preference points which advanced him from number 16 to number 4 and eventually to number 3 on the list, and thereby made him eligible for appointment.

(1) Section 18973 at the times here material provided that in certain examinations "a veteran with 30 days or more of service" who becomes "eligible for certification from eligible lists by attaining the passing mark established for the examination" shall be allowed specified additional points. The statute further provided: "For the purpose of this section, 'veteran' means any person who has served full time for 30 days or more in the armed forces in time of war or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States, or during the period September 16, 1940, to December 6, 1941, inclusive, or during the period June 27, 1950, to January 31, 1955, and who has been discharged or released under conditions other than dishonorable, ..." [FN3]

FN3 Section 18973 underwent minor revisions in 1967 and 1968 which are not material in the present case.

(2) Appellant was not a "veteran" within the meaning of the above statute. His service in the merchant marine did not satisfy the statutory service requirements specified as essential for a veterans' preference. The plain fact of the matter is that appellant was not entitled to any veterans'

preference credits. Indeed, appellant himself seems to concede all this.

Authority to determine the allowance of veterans' preferences emanates from the California Constitution [FN4] and has been in turn conferred by the Legislature upon the Department of Veterans Affairs. (§ 18976.) [FN5] The Department is thus *102 charged with the responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference. We think it is clear that in carrying out this responsibility the Department must make its determination in accordance with the statute allowing the additional credits. (§ 18973; see fn. 3, *ante*.)

FN4 Section 7 (entitled "Veterans' Preferences") of article XXIV (entitled "State Civil Service") of the California Constitution provides: "Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

FN5 Section 18976 provides: "Request for and proof of eligibility for veterans' preference credits shall be submitted by the veteran to the Department of Veterans Affairs. The procedures and time of filing such request shall be subject to rules promulgated by the Department of Veterans Affairs. After the State Personnel Board certifies that all parts of an examination have been completed and the relative standings of candidates are ready to be computed the Department of Veterans Affairs shall notify the State Personnel Board which candidates have qualified for veteran preference credits on the examination."

But the veteran himself has some responsibility in these matters. Under section 18976: "Request for and *proof of eligibility for veterans' preference credits* shall be submitted by the veteran to the Department of Veterans' Affairs." (§ 18976). (Italics added.) In the instant case, appellant's application for veterans' preference made on an

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official form of the Department is before us. At the top of the document in large bold type appears the following: "Instructions and Eligibility Requirements Are Listed on the Back of This Application." The reverse of the document contains, among other things, an explicit statement of the eligibility requirements in accordance with the language of section 18973. [FN6] Immediately above appellant's signature on the face of the application appears the following: "Signature: I Hereby Certify that I am eligible for veterans' preference and that the statements on this application are true, and I agree and understand that any misrepresentation of material facts herein may cause forfeiture of all right to any employment in the service of the State of California."

FN6 For example the first sentence reads in pertinent part as follows: "Only veterans with active service in the *armed forces* of the United States *in time of war*, or in time of peace in a campaign or expedition for service in which a medal has been authorized by the Government of the United States ... may receive a 10-point preference on State of California civil service examination" (Italics added.)

(3a) In sum, not only was the allowance of a veteran's preference to appellant unauthorized because he was at no time a veteran; it was also made as a consequence of appellant's erroneous representation to the Department that he was a veteran, when in fact he was not. Although appellant's representation may have been made in good faith and the Department's action may be characterized as a mistake, nevertheless the fact remains that the Department notified the Board that appellant was a candidate who qualified for veterans' preference credits on the examination (§ 18976) when in fact he did not.

(4) The action of the Department which appellant invoked by his request for veterans' preference credits was an integral *103 part of the civil service system established by the people (Cal. Const., art. XXIV; see *Boren v. State Personnel Board* (1951) 37 Cal.2d 634, 639 [234 P.2d 981]) and implemented by the Legislature through the State Civil Service Act (Act) (§§ 18500-19765). This system is grounded upon the constitutional mandate

that permanent appointments and promotion in the state civil service shall be "based upon merit, efficiency and fitness as ascertained by competitive examination." (Cal. Const., art. XXIV, § 1; see Gov. Code, §§ 18500, 18930, 18950). The Act provides a detailed method of carrying out this mandate (§ 18500, subds. (a) and (c)) so that among other objectives, appointments shall be based upon merit and fitness (§ 18500, subd. (c) (2)) and state civil service employment can be made a career. (§ 18500, subd. (c) (3).) It is manifest from an examination of the Act that the Legislature has taken great pains to prescribe exactly how appointment to state civil service positions is to be made. (See for example §§ 18532, 18900, 18950, 19052.) This finds emphatic confirmation in section 19050: "The appointing power in all cases not excepted or exempted by virtue of the provisions of Article XXIV of the Constitution shall fill positions by appointment, including cases of transfers, reinstatements, promotions and demotions, in strict accordance with this part and the rules prescribed from time to time hereunder, *and not otherwise*. Except as provided in this part, appointments to vacant positions shall be made from employment lists." (Italics added.)

(5) Viewing in this context the provisions of the Act dealing with veterans' preferences, we have no hesitancy in concluding that where, as in the instant case, a person on an eligible list claiming to be a veteran is not in fact a veteran, he is not entitled to receive veterans' preference credits, the Department of Veterans Affairs is without power to certify that he is entitled, and the State Personnel Board is without power to allow such credits.

(6) It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute. (*United States Fid. & Guar. Co. v. Superior Court* (1931) 214 Cal. 468, 471 [6 P.2d 243]; *Pacific Employers Ins. Co. v. French* (1931) 212 Cal. 139, 141-142 [298 P. 23]; *Grigsby v. King* (1927) 202 Cal. 299, 304 [260 P. 789]; *Garvin v. Chambers* (1924) 195 Cal. 212, 220- 223 [232 P. 696]; *Motor Transit Co. v. Railroad Com.* (1922) 189 Cal. 573, 577 [209 P. 586]; see *104 *Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1950) 34 Cal.2d 822 [215 P.2d 441]; *State Comp. Ins. Fund v. Industrial Acc. Com.* (1942) 20 Cal.2d

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264, 266 [125 P.2d 42]; *Allen v. McKinley* (1941) 18 Cal.2d 697, 705 [117 P.2d 342]; 1 Am.Jur.2d Administrative Law, § 70, p. 866.) An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. (See cases cited immediately above; see 2 Am.Jur.2d, Administrative Law, § 188, pp. 21-22.) (3b) In accordance with these principles, it has been held in this state, in matters pertaining to civil service and in other contexts, that when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void. (See *Aylward v. State Board of Chiropractic Examiners* (1948) 31 Cal.2d 833, 839 [192 P.2d 929]; *Patten v. California State Personnel Board* (1951) 106 Cal.App.2d 168, 172-175 [234 P.2d 987]; *Pinion v. State Personnel Board* (1938) 29 Cal.App.2d 314, 319 [84 P.2d 185]; *Campbell v. City of Los Angeles* (1941) 47 Cal.App.2d 310, 313 [117 P.2d 901].) To hold otherwise in the case before us would be to frustrate the purpose of the civil service system.

Having concluded that appellant was not entitled to the appointment in the first place and that his appointment was void, we proceed to determine whether the Board had jurisdiction to revoke his appointment "from the beginning" and to remove him from his position. As we have already pointed out, appellant attacks such action on two broad grounds: First, he argues, the jurisdiction of the Board is expressly limited by statute and no statute authorizes his removal; secondly, since at the time of his removal he had already performed efficient service for more than the six months' probationary period, he had become a permanent employee and his appointment had become final.

Appellant's first argument is launched from section 19500 [FN7] which deals with the tenure of permanent employees and their separation from state civil service. The gist of the argument is that none of the methods of separation delineated in section 19500 apply in the instant case, and that since the Legislature *105 has designated these methods of separation, it has of necessity excluded all others. The argument is misconceived and indeed ignores the circumstances of the problem before us. We are obviously not dealing with any of the situations covered by section 19500; nor are we

dealing with a removal for cause based on any of the causes for discipline specified in section 19572.

FN7 Section 19500 provides: "The tenure of every permanent employee holding a position is during good behavior. Any such employee may be temporarily separated from the State civil service through layoff, leave of absence, or suspension, permanently separated through resignation or removal for cause, or permanently or temporarily separated through retirement or terminated for medical reasons under the provisions of Section 19253.5."

Section 19253.5 makes provision for a medical examination of an employee for purposes of evaluating his capacity to perform his duties.

What we examine here is the jurisdiction of the Board to take corrective action with respect to an appointment which it lacked authority to make. It defies logic to say that the mere enumeration in the Act of the methods of separating an employee from state civil service in a situation where an appointment has been validly made, compels the conclusion that no jurisdiction exists to rectify the action of the Board in a situation where an appointment has been made without authority.

(7) It is true, as appellant argues, that the "State Personnel Board is a body of special and limited jurisdiction [and] ... has no powers except such as the law of its creation has given it." (*Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 287 [112 P.2d 341].) (8) But article XXIV, section 3 of the California Constitution directs that the Board "shall administer and enforce" the civil service laws. The jurisdiction of the Board, including its adjudicating power is derived directly from this section. (*Boren v. State Personnel Board*, *supra*, 37 Cal.2d 634, 637-638; *Neely v. California State Personnel Board* (1965) 237 Cal.App.2d 487, 488-489 [47 Cal.Rptr. 64]) and the Board's authority is governed by the Constitution as well as by the Civil Service Act. (*Boren v. State Personnel Board*, *supra*, 37 Cal.2d 634, 640- 641.)

Additionally we note that the Act provides in section 18670: "The board may hold hearings and make investigations concerning all matters relating

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to the enforcement and effect of this part and rules prescribed hereunder. It may inspect any State institution, office, or other place of employment affected by this part to ascertain whether this part and the board rules are obeyed.

"The board shall make investigations and hold hearings at the direction of the Governor or the Legislature or upon the petition of an employee or a citizen *concerning the enforcement and effect of this part and to enforce the observance of the provisions of Article XXIV of the Constitution and of this part and the rules made hereunder.*" (Italics added.)

The provisions of the Constitution and of the Act to which *106 we have just referred, considered in the light of the purpose, objective and entire scheme of the civil service system, convince us that in the matter here under review the Board was invested with the power, and, indeed, charged with the duty, to "administer and enforce" the applicable sections dealing with veterans' preference credits. (§§ 18973, 18976; see text accompanying fn. 3, *ante*; see fn. 5, *ante*.) Thus, after having been notified by the Department of Veterans Affairs which candidates had qualified for veterans' preference credits (§ 18976), it was the duty of the Board to apply such credit (§ 18974) and eventually to certify the three highest names on the eligible list to the appointing power. (§ 19057.) Essentially and in the final analysis, it was the Board which was charged with the responsibility of coordinating all of the procedures of the Act to the end of certifying only those persons who were lawfully entitled to the position. [FN8] In this constitutional and legislative scheme, a determination made by the Department contrary to the provisions of the Act, albeit in good faith, as to qualification for veterans' preference credits could not be conclusive upon the Board. If this were so, the Board's power to administer and enforce the Act would be eroded and that body would be compelled to certify for appointment persons who were in fact not entitled to the position.

FN8 We emphasize that the determination of eligibility for veterans' preference credits is only one step in a procedure designed to have promotions and appointments based upon merit, efficiency and fitness. To accomplish this objective,

the Board is charged, *inter alia*, with the responsibility of administering competitive examinations (§ 18930), setting passing grades (§ 18937), determining each competitor's earned rating (§ 18936), modifying these ratings by applying veterans' preference points (§ 18974), preparing eligible lists of those persons who may be lawfully appointed to any position within the class for which the examination is held (§ 18900), and certifying the three highest names to the appointing power. (§ 19057.)

(3c) We conclude, therefore, that when the matter was brought to its attention, the Board had jurisdiction to inquire into and review the certification as to veterans' preference credits made by the Department of Veterans Affairs and having determined that appellant was not entitled to such credits, to take the corrective action which it did by revoking appellant's appointment. While this jurisdiction does not appear to have been conferred upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws. *107

(9) We are satisfied that the Board was well within its power in entertaining the challenge made to the legality of appellant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly and unlawfully made, although made in good faith. In this, as we have already pointed out, the Board apparently received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined appellant's eligibility for veterans' preference credits and removed the preference. In the light of this background-an objection raised with the Department only a month after appellant's appointment, an objection made to the Board approximately three months later, and the prompt review of the matter by both agencies-appellant's insistent claim to an appointment to which he was not entitled in the first place, is exposed as utterly groundless. We can apprehend neither reason nor fairness in the position of appellant, who seemingly

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acknowledges that he was at no time a veteran within the terms of the statute but nevertheless insists that he should be permitted to retain the veteran's benefits to which he was never entitled.

We therefore reject appellant's arguments, first, that the Board having once made a good faith determination as to appellant's position on the list and having acted upon it, had no reserved power to annul its action; and second, that the appointment having once been accepted in good faith by appellant who performed efficiently in the position for the probationary period, could not be thereafter revoked by the Board.

As to the first argument, we have already explained why the Board had jurisdiction to review the matter and to take the corrective action it did. Our conclusions on this point are consistent with California precedents. In the cases already cited exemplifying the principle that appointments in violation of the civil service laws are void, it was recognized that the appropriate board had jurisdiction to correct the unlawful action taken. In *Campbell v. City of Los Angeles*, *supra*, 47 Cal.App.2d 310, mandate was denied to compel reinstatement of a civil service employee who had been reappointed after having been illegally restored to the eligibility list by the civil service commission and was subsequently discharged on the ground that since his restoration to the list was illegal, his appointment was illegal. Although the discharge seems to have been initially made by the department head, it was *108 passed upon and sustained by the civil service commission. In *Pinion v. State Personnel Board*, *supra*, 29 Cal.App.2d 314, the court denied mandate to compel the Board to recognize the petitioners, who had permanent status under civil service, as properly holding certain civil service positions although they had been actually certified for only a class of junior positions. It was there said: "The only positions lawfully held by these petitioners are those for which they were examined and to which they were certified and appointed in the manner provided by law." (29 Cal.App.2d at p. 318.) In *Aylward v. State Board of Chiropractic Examiners*, *supra*, 31 Cal.2d 833, 839, we said: "Implicit in the cases denying a board's power to review or reexamine a question, however, is the qualification that the board must have acted within its jurisdiction and within the

powers conferred on it. Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. Not only will a court refuse to grant mandate to enforce a void order of such a board [citations], but mandate will lie to compel the board to nullify or rescind its void acts. [Citation.] While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." [FN9]

FN9 Strangely enough, appellant while challenging the jurisdiction of the Board to take corrective action in the case before us, appears to recognize the inherent inequity of his position and goes out of his way to inform us that he is *not* arguing that a court, rather than the Board, "could not ... have removed [him] from his position pursuant to its general equity jurisdiction."

(10) Appellant's second argument, namely, that his appointment could not be revoked after the expiration of a six months' probationary period, is also without merit. Section 19173 provides: "Any probationer may be rejected by the appointing power during the probationary period for reasons relating to the probationer's qualifications, the good of the service, or failure to demonstrate merit, efficiency, fitness, and moral responsibility. ..." Here, appellant was qualified for the position in question because he passed the examination, but he was not eligible to be certified for it; it is not disputed that he *109 performed satisfactorily up to the time of his dismissal. Therefore, none of the grounds provided in section 19173 were available to the appointing power (Department of General Services) or the Board to dismiss appellant during his probationary period. Nor was section 19173 intended to cure any defect in certification and appointment deriving from violation of the civil service statutes. Appellant's separation from the

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position to which he now seeks reinstatement was effectuated under the implied power of the Board to rectify appointments made in violation of the civil service laws. For this reason, provisions for rejection during the probationary period are inapposite here.

It is convenient at this point to observe that *after* the occurrence of the events here involved and *after* the decision of the Court of Appeal in this case, the Legislature at its 1968 regular session enacted Government Code section 19257.5 which provides: "Where the appointment of an employee has been made and accepted in good faith, but where such appointment would not have been made but for some mistake of law or fact which if known to the parties would have rendered the appointment unlawful when made, the board may declare the appointment void from the beginning *if such action is taken within one year after the appointment.*" (Italics added.) (Added by Stats. 1968, ch. 500, § 1; in effect November 13, 1968.) The above section is of course not applicable to the case at bench. We wish to make clear, nevertheless, that our views and holdings in the instant case apply to a situation arising before the enactment of the statute and should not be deemed as derogating from, or otherwise affecting the proper operative effect of, the above statute, particularly the last clause thereof.

(11) Finally, appellant contends that the Board by its own rules was divested of jurisdiction "to accept the appeal" or to take action on April 9, 1965. The point of this argument is that appellant's appointment was made on August 24, 1964. and under the Board's rule 64 "every appeal shall be filed with the board ... within 30 days after the event happened upon which the appeal is based. Upon good cause being shown the board ... may allow such an appeal to be filed within 30 days after the end of the period in which the appeal should have been filed." Therefore, argues appellant, the protest made by the officer of the union on January 4, 1965, was an untimely appeal.

There are two answers. Assuming, that the above rules *110 governed, we think that any "appeal" to the Board was timely made after the Department of Veterans Affairs on January 19, 1965, formally notified the Board that appellant's veterans' preference had been "removed." Second, and more

importantly, we do not believe that it was necessary to file an "appeal" to the Board, which, upon the matter being called to its attention, clearly had jurisdiction to review and correct the initial action taken.

The judgment is affirmed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Burke, J., concurred.

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Westlaw.

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C

CALIFORNIA STATE RESTAURANT
 ASSOCIATION, Plaintiff and Respondent,
 v.

EVELYN E. WHITLOW, as Chief, etc., Defendant
 and Appellant

Civ. No. 38010.

Court of Appeal, First District, Division 4,
 California.

May 17, 1976.

SUMMARY

The trial court ordered issuance of a writ of mandate restraining the Chief of the Division of Industrial Welfare, State Department of Industrial Relations, from enforcing a policy of prohibiting an employer from taking a credit against the minimum wage of a restaurant employee for the dollar value of meals furnished, without the specific written consent of the employee. The court held that a minimum wage order promulgated by the Industrial Welfare Commission, then in effect, authorized employers in the restaurant industry to take a credit for meals furnished or reasonably made available to employees without such consent, that the announced policy would constitute an amendment to the order, and that it was therefore beyond the scope of defendant's authority. (Superior Court of the City and County of San Francisco, No. 680041, Ira A. Brown, Jr., Judge.)

The Court of Appeal reversed with directions to the trial court to deny the writ. While the court agreed with the trial court that the wage order permitted an employer to take credit for meals against the minimum wage without the employee's consent, it further held that the order was void as in conflict with the provision of Lab. Code § 450, that no employer shall compel or coerce any employee to patronize his employer, or any other person, in the purchase of anything of value. The court held there

was no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase." (Opinion by Caldecott, P. J., with Rattigan and Christian, JJ., concurring.) *341

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.

Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies.

(2) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.

In construing a statute or an administrative regulation, a court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation.

(3a, 3b) Labor § 10--Minimum Wage Orders.

A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, was correctly construed by the trial court as allowing the employer to take the credit without the consent of the employee, where every wage order relating to the restaurant industry during a period of over 20 years had referred to meals furnished by the employer as a part of the minimum wage, and no policy statements during that period made any reference to any requirement of employee consent, where during that period, and for many years prior thereto, it had been the open and recognized practice of restaurant employers to take a meal credit against the minimum wage without employee consent, and where the commission had considered and rejected a proposal that the wage order in question expressly require employee consent.

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(4) Statutes § 44--Contemporaneous Administrative Construction.

Contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized.

(5) Statutes § 44--Contemporaneous Administrative Construction--Reenactment of Statute With Established Administrative Construction.

Reenactment of a provision which has a meaning *342 well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied.

(6a, 6b) Labor § 10--Minimum Wage Orders--In Kind Payment of Wages as Compelled Purchase.

A provision of a minimum wage order promulgated by the Industrial Welfare Commission permitting restaurant employers to take a credit for the value of meals furnished employees against the minimum wage otherwise payable, construed as permitting the employer to take the credit without the consent of the employee, violates Lab. Code, § 450, which prohibits compelling or coercing an employee "to patronize his employer, or any other person, in the purchase of anything of value." There is no perceptible practical difference between an "in kind" payment of wages and a "compelled purchase," and any implied power the commission might have under Lab. Code, §§ 1182, 1184, to authorize in kind payments must be limited, in harmony with § 450, to situations in which such manner of payment is authorized by specific and prior voluntary employee consent.

[See **Cal.Jur.2d**, Labor, § 24; **Am.Jur.2d**, Labor and Labor Relations, § 1789.]

(7) Administrative Law § 30--Administrative Actions--Effect and Validity of Rules and Regulations--Necessity for Compliance With Enabling Statute.

Administrative bodies and officers have only such powers as have expressly or impliedly been conferred on them by the Constitution or by statute. In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for

that of the Legislature, and administrative regulations in conflict with applicable statutes are null and void.

(8) Statutes § 28--Construction--Ordinary Language.

In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part.

(9) Statutes § 27--Construction--Liberality--Remedial Statutes.

A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. *343

COUNSEL

Evelle J. Younger, Attorney General, and Gordon Zane, Deputy Attorney General, for Defendant and Appellant.

Hawkins, Cooper, Pecherer & Ludvigson, Daryl R. Hawkins, M. Armon Cooper and Nathan Lane III for Plaintiff and Respondent.

CALDECOTT, P. J.

The issue presented on this appeal is whether Labor Code section 450 prohibits an employer in the restaurant industry from requiring a minimum wage employee to take meals as part of his compensation and have the value of the meals deducted from the minimum wage without the written consent of the employee. We conclude that such action is prohibited.

On August 26, 1974, appellant Evelyn Whitlow, [FN1] as Chief of the Division of Industrial Welfare, Department of Industrial Relations for the State of California, announced her intention to institute a "new policy" regarding certain provisions of the then current minimum wage order of the Industrial Welfare Commission.

FN1 The writ of mandate issued by the trial court was directed to Whitlow, who is hereinafter described as "appellant" although the agency itself is also a named

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party and appellant.

Section 4 of Minimum Wage Order No. 1-74 allowed employers in the restaurant industry to take a credit for the value of meals furnished employees against the minimum wage otherwise payable. The "new policy" set forth in a document entitled "Meal Policy for Restaurants Only," inter alia, prohibited a credit against the minimum wage for the dollar value of meals furnished without the *specific written consent of the employee*. It further provided that such consent could be revoked at the beginning of each month. This new policy was based on appellant's determination that the current construction of section 4 of Order No. 1-74 was in violation of section 450 of the Labor Code.

Respondent California State Restaurant Association filed a petition for a writ of mandate to in effect restrain the appellant from putting the "new policy" into operation. The trial court entered judgment granting a *344 peremptory writ of mandate in favor of respondent. The appeal [FN2] is from the judgment.

FN2 Appellant in her brief has limited her appeal to that portion of the judgment enjoining enforcement of appellant's "New Policy" of requiring prior revocable employee consent to meal credit deductions from the cash minimum wage.

I

The court below concluded that section 4 of Minimum Wage Order No. 1-74 "authorizes employers in the restaurant industry to take a credit ... for meals furnished or reasonably made available to employees without the specific written consent of such employees to have the value of such specific meals credited by employers against the minimum wage otherwise due the employees" Because the appellant's "new policy" would thus constitute an amendment to the order, the court held that it was beyond the scope of her authority, as only the Industrial Welfare Commission has the power to adopt or change a minimum wage order. (Lab. Code, § 1182.)

Appellant contends that the wage order is silent on the issue of consent to meal credit deductions, and

that there has been no administrative interpretation of the regulation to the effect that such deductions are authorized in the absence of employee consent. Thus, appellant argues, the policy statement was within the authority of the Division of Industrial Welfare to take all proceedings necessary to enforce minimum wage regulations in accordance with the law, specifically, the prohibitions of Labor Code section 450. (Lab. Code, §§ 59, 61, 1195.)

(1) Generally, the same rules of construction and interpretation which apply to statutes govern the interpretation of rules and regulations of administrative agencies. (*Cal. Drive-In Restaurant Assn. v. Clark*, 22 Cal.2d 287, 292 [140 P.2d 657, 147 A.L.R. 1028]; *Intoximeters, Inc. v. Younger*, 53 Cal.App.3d 262, 270 [125 Cal.Rptr. 864].) The Industrial Welfare Commission acts as a quasi-legislative body in promulgating minimum wage orders. (*Rivera v. Division of Industrial Welfare*, 265 Cal.App.2d 576, 586 [71 Cal.Rptr. 739].) (2) Of course, the cardinal rule of construction is that the court should ascertain the intent of the promulgating body so as to effectuate the intended purpose of the statute or regulation. (*East Bay Garbage Co. v. Washington Township Sanitation Co.*, 52 Cal.2d 708, 713 [344 P.2d 289]; *California Sch. Employees Assn. v. Jefferson Elementary Sch. Dist.*, 45 Cal.App.3d 683, 691 [119 Cal.Rptr. 668]; Code Civ. Proc., § 1859.) This rule has been extended to *345 construction of administrative regulations. (*Cal. Drive-In Restaurant Assn. v. Clark*, *supra*.)

(3a) Thus, the commission's intent is the most significant factor in interpretation of its wage order. In reaching the conclusion that meal credit deductions without employee consent are authorized by section 4 of order No. 1-74, the trial court properly relied on two additional principles of construction. (4) First, "contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized." (*Rivera v. City of Fresno*, 6 Cal.3d 132, 140 [98 Cal.Rptr. 281, 490 P.2d 793].) (5) Second, reenactment of a provision which has a meaning well-established by administrative construction is persuasive evidence that the intent of the enacting authority was to continue the same construction previously applied. (

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Cooper v. Swoap, 11 Cal.3d 856, 868 [115 Cal.Rptr. 1, 524 P.2d 97]; *Cal. M. Express. v. St. Bd. of Equalization*, 133 Cal.App.2d 237, 239-240 [283 P.2d 1063].)

(3b) Appellant urges that there was no administrative construction of the prior wage orders, but only an interpretation by the restaurant industry. The record belies this assertion. Since 1952, every minimum wage order relating to the restaurant industry has specified that "when meals are furnished by the employer *as a part of the minimum wage*, they may not be evaluated in excess of the following [cash equivalents]" (Italics added.) Since at least 1944, it has been the open and recognized practice of the restaurant industry for employers to take a meal credit against the minimum wage without employee consent. Division of Industrial Welfare "Policy" statements prior to the appellant's 1974 notice make no reference to any requirement of employee consent. Moreover, the commission considered a proposal that wage order No. 1-74 expressly requires employee consent to such meal credits, but this was written out of the final version of the order. Just as "[t]he sweep of the statute should not be enlarged by insertion of language which the Legislature has overtly left out" (*People v. Brannon*, 32 Cal.App.3d 971, 977 [108 Cal.Rptr. 620]), so the wage order should not be interpreted as including a limitation declined by the commission. In the face of a well-known and documented interpretation and application of the regulation over many years, the commission ratified that construction by reenacting the regulation in substantially the same form, without substantive change. *346

This interpretation was thus properly accepted by the trial court as authoritatively intended by the commission in wage order No. 1-74. However, this is not dispositive of the matter, for it is clear that the administrative regulation, as interpreted, must not conflict with applicable state laws; to the extent that it does so conflict, the regulation is void.

II

(6a) Appellant contends that the meal credit provision of order No. 1-74, as construed, violates Labor Code section 450, which provides: "No employer, or agent or officer thereof, or other

person, shall compel or coerce any employee, or applicant for employment, to patronize his employer, or any other person, in the purchase of any thing of value."

Respondent argues that the meal credit provision does not permit an employer to "compel or coerce" an employee to "purchase" a meal within the meaning of section 450, but rather merely authorizes the employer to reduce his *cash* minimum wage obligation by part payment "in kind." Thus, respondent contends, the meal credit against the minimum wage otherwise payable is not a "purchase" within section 450, but is instead a partial fulfillment of the employer's minimum wage obligation; where a meal is provided an employee is not entitled to the higher cash minimum wage. Respondent urges that under Labor Code sections 1182 and 1184, [FN3] the Industrial Welfare Commission has an implied power to authorize in kind payment of wages without employee consent to such manner of payment, and the wage order as construed is a valid exercise of such authority.

FN3 Section 1182 provides in pertinent part:

"After the wage board conference and public hearing, as provided in this chapter, the commission may, upon its own motion or upon petition, fix:

"(a) A minimum wage to be paid to employees engaged in any occupation, trade, or industry in this state, which shall not be less than a wage adequate to supply the necessary costs of proper living to, and maintain the health and welfare of such employees."

Section 1184 provides: "After an order has been promulgated by the commission making wages ... mandatory in any occupation, trade, or industry, the commission may at any time upon its own motion, or upon petition of employers or employees reconsider such order for the purpose of altering, amending, or rescinding such order or any portion thereof. For this purpose the commission shall proceed in the same manner as prescribed for an original order. Such altered or amended order shall have the same effect as the original order."

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(7) Administrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or *347 by statute. (*Ferdig v. State Personnel Bd.*, 71 Cal.2d 96, 103 [77 Cal.Rptr. 224, 453 P.2d 728].) In the absence of valid statutory or constitutional authority, an administrative agency may not, under the guise of regulation, substitute its judgment for that of the Legislature. Administrative regulations in conflict with applicable statutes are null and void. (*Harris v. Alcoholic Bev. Etc. Appeals Bd.*, 228 Cal.App.2d 1, 6 [39 Cal.Rptr. 192]; *Hodge v. McCall*, 185 Cal. 330, 334 [197 P. 86].)

Certain additional principles of construction are helpful to resolution of this controversy. (8) In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part. (*Anaheim Union Water Co. v. Franchise Tax Bd.*, 26 Cal.App.3d 95, 106 [102 Cal.Rptr. 692].) (9) A remedial statute must be liberally construed so as to effectuate its object and purpose, and to suppress the mischief at which it is directed. (*City of San Jose v. Forsythe*, 261 Cal.App.2d 114, 117 [67 Cal.Rptr. 754]; *Lande v. Jurisich*, 59 Cal.App.2d 613, 616-617 [139 P.2d 657].)

(6b) Section 450 manifests a legislative intent to protect wage earners against employer coercion to purchase products or services from the employer. In the context of the present case, that section is plainly part of "the established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him." (*City of Ukiah v. Fones*, 64 Cal.2d 104, 108 [48 Cal.Rptr. 865, 410 P.2d 369].) The Legislature evidently determined "that the evil thus to be guarded against was sufficiently prevalent to require legislative action, and the remedy ought not to be defeated by judicial construction if that result can reasonably be avoided." (*Lande v. Jurisich*, *supra*, 59 Cal.App.2d at p. 617.)

While it may be argued that "in kind" payment of wages is not technically or narrowly speaking a "compelled purchase," there is no perceptible practical difference between the two. Where an employee is not allowed the choice between cash and in kind payment, but rather is forced to accept

goods or services from his employer in lieu of cash as part of the minimum wage, the same mathematical result obtains as if the employer had paid the wages in cash with the condition that the employee spend with the employer an amount equal to the allowable credit (here, on a meal) at the end of each shift. This latter practice unquestionably violates section 450. Employers cannot be permitted to evade the salutary objectives of the statute by indirection. *348

Moreover, sections 1182 and 1184, urged by respondent in support of its contentions, are similarly subject to the rule of liberal construction of remedial legislation. (*California Grape etc. League v. Industrial Welfare Com.*, 268 Cal.App.2d 692, 698 [74 Cal.Rptr. 313].) Additionally, the statutes must be construed in harmony with section 450, so as to carry out the fundamental legislative purposes of the whole act. (*Earl Ranch, Ltd. v. Industrial Acc. Com.*, 4 Cal.2d 767, 769 [53 P.2d 154]; *Moyer v. Workmen's Comp. Appeals Bd.*, 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].) In light of the prohibition against compelled purchases in section 450, the implied power of the commission to authorize in kind payments must be limited to situations in which such manner of payment is authorized by specific and prior voluntary employee consent. This limitation is consistent with the strong public policy favoring full payment of minimum wages, which the Legislature has effectuated by making payment of less than the minimum wage unlawful. (Lab. Code, § 1197.)

The judgment is reversed with directions to the trial court to deny the petition for writ of mandate.

Rattigan, J., and Christian, J., concurred.

A petition for a rehearing was denied June 16, 1976, and respondent's petition for a hearing by the Supreme Court was denied July 15, 1976. *349

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